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IN THE

# Supreme Court of the United States

October Term, 1964

No. 78

ELLERMAN LINES, LTD.,
*Respondent,*

*v.*

ATLANTIC & GULF STEVEDORES, INC.,
*Petitioner.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

FRANCIS E. MARSHALL,
226 South 16th Street,
Philadelphia, Pa. 19102
*Attorney for Petitioner.*

SYDNEY C. ORLOFSKY,
*Of Counsel.*

International, 711 So. 50th St., Phila., Pa. 19143

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IN THE

# Supreme Court of the United States.

OCTOBER TERM, 1964.

No.

ELLERMAN LINES, LTD.,

*Respondent,*

*v.*

ATLANTIC & GULF STEVEDORES, INC.,

*Petitioner.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

The Petitioner, Atlantic & Gulf Stevedores, Inc., is a Pennsylvania corporation which will hereinafter be sometimes referred to as "Petitioner" or "Stevedoring Company". Petitioner respectfully prays that this Honorable Court may grant a writ of certiorari to the United States Court of Appeals for the Third Circuit to review a judgment of that court entered December 11, 1964, in which rehearing was denied January 22, 1965.

## OPINIONS BELOW.

The opinion of the Court of Appeals dated December 11, 1964 is reported in 339 F. 2d 673 (3rd Cir. 1964). It is set forth fully in an appendix to this petition. The opinion of the District Court is reported in 224 F. Supp. 336 (E. D. Pa. 1963).

## JURISDICTION.

(a) The judgment of the Court of Appeals for the Third Circuit, reversing the judgment in favor of this Petitioner which had been entered in the United States District Court for the Eastern District of Pennsylvania, was entered on December 11, 1964.

(b) Pursuant to its rules, the Court of Appeals for the Third Circuit entered an order dated December 22, 1964 extending the time within which a petition for rehearing might be filed to January 18, 1965. Petition for Rehearing was filed on January 15, 1965 and denied on January 22, 1965.

(c) Jurisdiction to consider this petition is conferred upon this Court by 28 U. S. C. A. 1254(1), the petition being timely filed under the provisions of 28 U. S. C. A. 2101(c).

## QUESTIONS PRESENTED.

1. Must not a District Court, sitting in admiralty, dismiss a shipowner's libel for indemnity against a stevedoring company, where the shipowner's liability and the basis for such liability has not as yet been determined by the jury in a pending civil action in the same District between an injured longshoreman and such shipowner?

2. Is not such an action, brought in admiralty, premature before such time as the liability of the shipowner and the nature of such liability is established in the pending civil action?

3. Is it essential that a libel in admiralty for indemnity by a shipowner against a stevedoring company, to recover the amount of a potential judgment, costs and expenses arising out of a pending civil suit by a longshoreman against such shipowner, be supported by a contractual obligation, and if so must such contractual obligation be maritime in nature?

4. Is not a libel filed in admiralty to recover such indemnity excessive where the libellant is a defendant in a civil action pending in the same District and the stevedoring company can timely be joined as a third-party defendant therein?

## STATEMENT OF THE CASE.

On October 10, 1962, Nathan Eckles filed an action in the U. S. District Court for the Eastern District of Pennsylvania, being Civil Action No. 32162, and captioned "Nathan Eckles v. Ellerman Lines, Ltd." claiming to recover for injury sustained by him by reason of the unseaworthy conditions of the Respondent's ship "City of Canberra" and the negligence of this Appellant.

The Complaint so filed alleged that at the time of such injuries the plaintiff therein, Nathan Eckles, was an employee of Atlantic and Gulf Stevedores, Inc. in the capacity of longshoreman, and that this Petitioner was employed in loading cargo aboard the "S. S. City of Canberra" by virtue of an understanding entered into with the vessel's owners, Respondent herein.

Notwithstanding the right and ability of the Respondent herein to serve third party process within the time prescribed by law against this Petitioner within this district, it failed to use such third party process or join this Petitioner in the proceedings pending and referred to above, but instead instituted an independent action in admiralty alleging that this Petitioner conducted its stevedoring operations on the "City of Canberra" at the times referred to in the Civil Action Complaint referred to above, in such negligent and careless manner as to cause injury to the plaintiff named in the said Civil Action.

This Petitioner filed exceptions in the District Court which aver:

(a) This Court lacks jurisdiction in Admiralty over the subject matter of the action;

(b) Said action is excessive and unnecessary;

(c) The claims of the Libellant can and must be raised, under the circumstances through third party proceedings in an action pending in the United States

District Court for the Eastern District of Pennsylvania being Civil Action No. 32162;

(d) The instant action will result in a multiplicity of suits;

(e) The instant action was premature. For the reasons assigned, Petitioner prayed that the action be dismissed.

This Petitioner's exceptive allegations attached a copy of the contract referred to in the Libel. An examination of this contract reveals that there is no specific or express agreement on the part of the Petitioner to indemnify for personal injuries of any person. The sole reference in the contract to the responsibility of Petitioner for the work done by it is in Paragraph 10 wherein the Petitioner agreed to be legally liable for damage to the ship, its equipment and to cargo or loss of cargo overside through its negligence; and in the same paragraph where its liability for loss or damage to cargo/or baggage is expressly limited to physical damage caused by the negligence of the Petitioner and to claims as to such items as result from fraud on the part of Petitioner's employees. No other word, phrase or paragraph of the Agreement refers to or seeks to establish liability for negligence as to its own employees.

Upon the exceptive allegations being filed and the contract being attached thereto, the Respondent recognized that no contractual obligation was specifically undertaken. It relied instead upon an implied obligation extrinsic to the contract between the parties.

Upon the filing of this Petitioner's exceptions and exceptive allegations and hearing thereon, Judge Van Dusen dismissed the libel on the ground of prematurity, neither the liability of the shipowner nor the stevedore having yet been shown. *Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc.*, 224 F. Supp. 363 (E. D. Pa. 1963).

On appeal the Court of Appeals for the Third Circuit reversed the judgment of the District Court and remanded the cause for further proceedings consistent with its opinion. *Ellerman Lines, Ltd. v. Atlantic & Gulf Stevedores, Inc.*, 339 F. 2d 673 (3rd Cir. 1964). The Court's holding was based upon the fact that Ellerman Lines, Ltd. had already expended sums of money in its defense of the main action by Nathan Eckles. The Court stated that since "Ellerman instituted this libel after it had made necessary out-of-pocket expenses and had incurred obligations for legal services in defending Eckles' suit against it, Ellerman is presently entitled to some recovery if it can prove the allegations of its libel" (Opinion, pp. 35, 36).

This Petitioner, within the requisite time allowed by the rules, filed a Petition for Rehearing with the Court of Appeals for the Third Circuit, but such Petition was denied by the Court en banc.

## REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT.

### A. The Decision Below Deprives Petitioner of a Jury Trial as a Matter of Right and Rules on an Important Question of Maritime Law Prolific of Litigation.

The decision of the Court of Appeals in the instant case deals with an important question of maritime law which is prolific of litigation. There are good indications that there are at present more cases of longshoremen suing shipowners than there are cases of seamen suing under the Jones Act: Huttenbrauck "The Liability of the Stevedore Pursuant to its Warranty of Workmanlike Service" (1961 Proceedings, Section of Insurance, Negligence and Compensation Law, Am. Bar Asso. p. 187). This has led to a consequent increase in the cases in which shipowners have sought indemnity from stevedoring companies which employ such longshoremen, to recover sums paid in satisfaction or in settlement of such litigation. The majority of cases brought by such longshoremen are initiated on the civil side of the court where trial by jury may be demanded. In the majority of cases where shipowners seek indemnity against stevedoring companies, the stevedoring company is joined as a third-party defendant in the civil action brought by the longshoremen against the shipowner. As a result the stevedoring company may demand a jury trial, as between itself and the shipowner as to the issues raised in the indemnity proceedings. In the instant case within the time limit prescribed by local Rule 19 of the District Court the shipowner could have joined the Petitioner herein as a third-party defendant in the original civil action instituted by the injured longshoreman. It deliberately chose not to do so. Instead it instituted the instant action in the admiralty court seeking admittedly to avoid the jury process

and particularly because of its apprehension "that a jury in the civil case would make a less competent and adequate determination of fair counsel fees as an item of indemnification than would a Judge considering the same claim in admiralty" (Opinion, p. 34). The Court of Appeals frankly called this a "tactical maneuver".

The effect of this "tactical maneuver", as permitted by the Court of Appeals in contradiction of the law duly applicable and hereinafter discussed, will result in a multiplicity of suits in a District where litigation is heavy and calendars are already congested. The involved action is excessive in the legal sense. *Ruth M. Noel et al. v. Linea Aeropostal Venezolana,* 318 F. 2d 710 (2d Cir. 1963).

The general pattern in this District has been to raise all such claims for indemnity in the civil action brought by the injured longshoreman. The process and rules governing the independent claim for indemnity of the shipowner against the stevedore are constantly being forged in these latter proceedings.

In *American Stevedores, Inc. v. Porello,* 330 U. S. 456 (1947), this court stated that it would not sever a contract provision for indemnity for damages arising out of the performance of wholly maritime activities because it would "only needlessly multiply litigation". In *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.,* 355 U. S. 563, 78 S. Ct. 438, 2 L. Ed. 491 (1958), the court again held that a claim for indemnity against the stevedoring company was for jury consideration under appropriate instructions. In *Atlantic & Gulf Stevedores v. Ellerman Lines,* 369 U. S. 355, 82 S. Ct. 780, 7 L. Ed. 2d 798 (1962) this court, holding that a jury verdict bound the rights as between shipowner and stevedoring company as well as those between longshoremen and shipowner said "it is the Seventh Amendment that fashions the federal policy favoring jury decisions of disputed fact questions". In *Fitzgerald v. U. S. Lines,* 374 U. S. 16, 83 S. Ct. 1646, 10 L. Ed. 2d 720 (1963), this court held that where a seaman brought an action

under the Jones Act, which explicitly provides for a jury trial as of right, and joins traditional admiralty remedies for unseaworthiness and for maintenance and cure he is entitled upon demand to a jury trial of all the issues arising out of the single accident.

The issues involved in this case as set forth in this Petitioner's exceptions and exceptive allegations relate to the jurisdiction of the District Court to entertain an independent claim in admiralty for indemnity, under the facts involved and to the prematurity of such action, in any event, absent a finding of liability of the shipowner to the longshoreman. The questions so raised by this petitioner require consideration by this Court.

**B. The Action Was Premature.**

In the absence of a specific contractual provision to the contrary, a shipowner which is not liable for a longshoreman's personal injury or death cannot recover indemnity from a stevedoring company: *West Africa Navigation Ltd. v. Nacirema Operating Co.*, 191 F. Supp. 131 (E. D. Pa. 1961); *Hill v. American President Lines Ltd.*, 194 F. Supp. 885 (D. C. Va. 1961); *U. S. v. Northern Metal Company*, 227 F. Supp. 397 (E. D. Pa. 1964).

Declaring that before a right of indemnity can arise "there must first be a legal liability imposed on the indemnitee" the court in *West Africa Navigation Ltd. v. Nacirema Operating Co.*, (*supra*) dismissed a shipowner's motion to join a stevedoring company as third-party defendant on the theory of liability over, "by way of indemnity" should the plaintiff longshoreman recover against the shipowner for injuries allegedly sustained while discharging bales of wood pulp from the shipowner's vessel. The decision was rested on the ground that there was a possibility of the shipowner being held not liable to the longshoreman, in which case the stevedoring company could not be liable over to the shipowner.

In dismissing the action, Chief Judge Clary said:

"However, the fatal defect to plaintiff's argument is the assumption that defendant has breached its contractual duty. In the longshoreman's action a number of different results may be reached, only one of which would give plaintiff a cause of action for indemnity. It might be determined that neither plaintiff nor defendant are liable to Raymond, in which case no right of indemnity can arise. Or, it may be decided that Raymond's injuries were caused solely by the plaintiff's primary negligence and/or the unseaworthiness of plaintiff's vessel, not brought about by action of the defendant or its employees, which again would bar any action over against defendant. And it could be found that plaintiff and defendant were concurrent joint tortfeasors which would preclude any action between them. *Halcyon Lines et al. v. Haenn Ship Ceiling & Refitting Corp.*, 1952, 342 U. S. 282, 72 S. Ct. 277, 96 L. Ed. 318; *Pope & Talbot Inc. v. Hawn,* 1953, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143. Finally, it is possible that defendant may be held solely liable. But in any event it is obvious, because of these various contingencies, that we cannot permit plaintiff to pursue this action further at this time. Plaintiff is assuming a fact which is necessary of proof, namely, that defendant did breach its contractual duty."

Adverting to "other cogent reasons" why the action could not be maintained because premature, Judge Clary stated that the legal liability of the indemnitee must first be established even where the contract is one of indemnity against liability as distinguished from indemnity against loss or damage and quoted from 27 Am. Jur. "Indemnity", Sec. 22 as follows:

"Where the contract is one of indemnity against liability as distinguished from indemnity against loss or

damage, it has very generally been held that an action may be brought and recovery had as soon as the liability is legally imposed. And it is sufficient to show that a judgment has been recovered against the person indemnified, although such judgment remains unpaid. But a mere claim or demand against an indemnitee when no legal liability exists does not give rise to a right to indemnity under an agreement to indemnify against liability in the sense of accrued liability." 27 Am. Jur. "Indemnity", Sec. 22.

Compare *Sorenson v. Overland Corp.*, 142 F. Supp. 354, 361 (D. C. 1956), aff'd 242 F. 2d 70 (3rd Cir. 1957).

In *Hill v. American President Lines Ltd.*, (*supra*) in which the United States space-chartered a vessel, and a longshoreman injured while loading the vessel brought a libel against the shipowner, which impleaded the United States and the stevedoring company, and in which the shipowner was held not liable to the longshoreman, it was also held that the shipowner and the United States were not entitled to recover, "by way of indemnity", expenses and attorney's fees incurred by them in their defense.

"Undoubtedly contracts may be so worded as to make an indemnitor liable to his indemnitee irrespective of the outcome of the litigation" the court said, in the *Hill* case (*supra*), but in the absence of such an agreement and "absent a willingness to abandon the defense of the original action", such expenses are not recoverable. The court added:

> "[T]his Court perceives no reason, as a matter of discretion at least, why the stevedore should now be burdened by such items of expense when the stevedore did not breach the terms of any express or implied contract, and has otherwise protected itself, as required by law, under the Longshoremen's and Harbor Workers' Compensation Act."

In the *Northern Metal Company* case (*supra*), Judge Body sitting in the District Court for the Eastern District of Pennsylvania, dealt with a libel brought by the United States, sued in an original action on the ground that a United States vessel was liable, for indemnity arising from fatal injury to a longshoreman. On exceptions filed, Judge Body dismissed the libel without prejudice, saying (p. 397):

> "There is no doubt that the right to indemnification may arise, and often does, in cases of injury arising out of the unloading of vessels. However, it is well settled in this District that such an action is premature when trial is pending in the original action against the vessel. *West Africa Navigation, Ltd. v. Nacirema Operating Co.*, 191 F. Supp. 131 (E. D. Pa. 1961). It is to be noted that neglect in the failure to seek timely joinder of the stevedore created the problem in that case, as it seems to have done here. Also see *Mitsui Steamship Co., Ltd. v. Jarka Corporation of Philadelphia*, 218 F. Supp. 424 (E. D. Pa. 1963)."

The *Mitsui* case referred to by Judge Body also involved a case brought in the Eastern District of Pennsylvania. Again, the action was in admiralty to which respondent filed exceptive allegations and a Motion to Dismiss. District Judge Kraft, relying upon *West Africa* stated (p. 425):

> "The decisive factor in both cases is the absence of a present cause of action. A cause of action, for these purposes, may be defined as 'the unlawful violation of a right which the facts show'. *Hurn v. Oursler*, 289 U. S. 238, 246, 53 S. Ct. 586, 590, 77 L. Ed. 1148 (1933). The facts alleged, here as in *West Africa*, failed to show the unlawful violation of a right, i.e. a right to indemnity against either liability or loss or damage. . . . It is apparent, however, that until the legal liability of

libelant to Mitsui & Co., Ltd. is first determined in the New York litigation, the instant suit is nothing more than an abstraction."

The Court of Appeals, in its opinion in the instant case does not find the *West Africa case* (*supra*), to be wrongly decided and indeed distinguishes it on a ground having no relevance to the issue of whether the action itself is premature. It suggests (p. 675 of its opinion reported at 339 F. 2d 673) that:

> "Since Ellerman instituted this libel after it had made necessary out of pocket expenses and incurred obligations for legal services in defending Eckles' suit against it,[3] Ellerman is presently entitled to some recovery, if it can prove the allegations of its libel."

The footnote 3 referred to in the quotation reads:

> "3. In contrast, no claim was made for damages already suffered in an otherwise similar libel which the district court dismissed in *West Africa Navigation, Ltd. v. Nacirema Operating Co.*, E. D. Pa. 1961, 191 F. Supp. 131."

It is evident that a mere allegation of the incurring of out of pocket expense prior to the institution of the libel cannot affect the precedent substantive requirement that the *liability of the indemnitee should first be established in the original action.* In deciding that the mere allegation of a dollar amount of damage suffered renders the libel timely, the Court of Appeals completely disregarded the conditions which were essential for the accrual of a cause of action in indemnity, contrary to the rule prevalent in this and other circuits and contrary to the meaning of leading cases decided by this Honorable Court, which are hereinafter discussed.

The Court of Appeals in this case sought no consensual obligation and failed to consider whether the obligation to

indemnify here alleged was of the essence of the stevedoring contract actually involved, or was really predicated on an implied-in-fact warranty, facts which the *Ryan* case, (350 U. S. 124) held to be essential. Despite the exhibited contract between the parties, which negated any promise, express or implied, to be responsible by way of indemnity for personal injuries sustained by its own employees, the Court of Appeals, relying solely upon the unfounded allegation of a *breach of a promise* held that "the alleged breach of a promise to render workmanlike service necessarily occurred no later than the time of Eckles' injury. Therefore in relation to the alleged breach of duty this libel cannot have been premature." 339 F. 2d at 674.

The error of this holding is that the breach for which the respondent in the court below could be liable was the breach of the duty to indemnify, not the breach of the duty to render workmanlike service. The breach of the latter duty merely creates the duty to indemnify. The breach of the duty to render workmanlike service cannot be determined until a jury in the original action between the longshoreman and the shipowner makes its findings.

The District Court treated essentially the question of whether the libel in the instant case was premature, and properly said:

> "The general rules of law applicable to this case may be simply stated: in the first place, the ship may not be liable to the employee; in the second place, a stevedore is not an insurer but he is obligated to reimburse the ship for damages caused it, for example, by the stevedore's negligence or breach of warranty of workmanlike service or, if the stevedore brings into play the condition causing the injury, he is liable to indemnify the vessel. Whether or not the stevedore was negligent and whether or not the stevedore's negligence breached any duty to the ship's owner is a question of fact to be determined by the trial court in the original action. On the other hand, even if the stevedore was negligent

and/or breached a warranty to the ship, it must be noted that certain conduct on the part of the shipowner can preclude his right to recovery. To obtain indemnity, a loss by the indemnitee (in this case, liability of the shipowner to the employee), as well as a breach of duty must be shown. Since neither such loss nor such breach of duty has been shown on this record, libellant has no cause of action at this time. . . .

Neither the search made by the court nor the briefs and oral argument made by counsel have revealed authority for the proposition argued by libellant; namely, that admiralty will entertain an action for indemnity when the principal liability has not been ascertained and there has been no showing of impaired financial responsibility of a resident respondent.

While it is true that libellant has been required to spend certain sums of money to defend the employee's action against itself, this alone does not give rise to a cause of action for indemnification. If, ultimately, it should be found that respondent has breached a duty it owes to the libellant, then libellant will be indemnified for its cost and reasonable counsel fees, but until the breach of duty and the right to indemnification are shown, libellant does not have a present claim and the action will be dismissed." *Ellerman Lines v. Atlantic Gulf Stevedores, Inc.*, 224 F. Supp. 336, 337-338 (E. D. Pa. 1963).

**C. The Court of Appeals Applied Doctrines Contrary to the Decisions of This Court.**

In reversing the judgment of the District Court, the Court of Appeals impliedly approved decisions in its circuit which are directly in conflict with its decision and failed to properly and correctly apply the doctrine of indemnity enunciated by this Honorable Court in *Ryan Stevedoring*

*Co. v. Pan Atlantic S. S. Corp.*, 350 U. S. 124, 76 S. Ct. 232, 100 L. ed. 133 (1956), upon which the libel in question was based.

The concept of indemnity applied by the Court in *Ryan* was one of indemnity against "liability" as opposed to indemnity against "loss or damage". The distinction between the two is significant, since it is here asserted that the court of appeals failed to properly and correctly apply the *Ryan* indemnity doctrine in the instant case.

The cause of action on a contract of indemnity against "liability" is complete as soon as, *but not before,* the liability of the indemnitee has become fixed, as on the recovery of a judgment against him, even though he has sustained no actual monetary loss or has not paid the judgment. 42 C. J. S. § 14(b); *Michel v. American Fire & Casualty Co.*, 82 F. 2d 583 (5th Cir. 1936); *The Toledo,* 122 F. 2d 255 (2d Cir. 1941); *Hovis v. The P & G Boat Store,* 183 F. Supp. 810 (E. D. Mo. 1960).

The language of the Court in *Ryan* and significant decisions of the United States District Court for the Eastern District of Pennsylvania are indicative of the fact that the indemnity concept enunciated in *Ryan* contemplated the existence of a cause of action on behalf of the shipowner as soon as, but not before, its liability, or the liability of the stevedore, had become fixed. See also, *Weyerhaeuser Steamship Co. v. Nacirema Operating Co*, 355 U. S. 563, 78 S. Ct. 438, 2 L. ed. 2d 491 (1958). Cf. *Greenwich Marine Incorporated v. S. S. Alexandra,* 225 F. Supp. 671, 674-675 (S. D. N. Y. 1964).

In discussing whether § 5 of the Longshoremen's and Harbor Worker's Compensation Act (33 U. S. C. § 901 et seq.) precluded liability of the stevedore to the shipowner Justice Burton, speaking for a majority of the Court in *Ryan,* stated:

> "The Act nowhere expressly excludes or limits a shipowner's right, as a third person, to *insure itself against such a liability* (to an injured longshoreman) either by

a bond of indemnity, or the contractor's own agreement to save the shipowner harmless." Emphasis supplied. 350 U. S. at 130.

Such language undoubtedly indicates acceptance by the Court of the position taken by amicus curiae (the United States) in its *Ryan* brief. It was there stated:

> "Indemnity, as used in this case, means *the right to recover damages resulting from the breach of a contractual duty in consequence of which a liability has been imposed upon the person to whom the contractual duty was owed.*" Emphasis supplied. 100 L. ed. at 135.

It cannot be made clearer than as stated above that the right to indemnity contemplated by the Court in *Ryan* is a right which becomes choate only upon the fixing of liability.

To the same effect is the language of the Court in *Weyerhaeuser* where, in discussing the stevedore's use of the ship's equipment for the purpose of handling of cargo, it stated:

> "If in that regard respondent (stevedore) rendered a substandard performance *which led to foreseeable liability,* the latter was entitled to indemnity absent conduct on its part to preclude recovery." 355 U. S. at 567. (Emphasis supplied.)

Thus, it was again made explicit that the shipowner's right to indemnity is engendered only by a finding that the stevedore's breach of its warranty of workmanlike service has given rise to liability.

The *West Africa* case (*supra*), stands for the proposition that the imposition of legal liability upon the indemnitee or a determination of fault on the part of the stevedore is a prerequisite to the existence of a present cause of action. 191 F. Supp. at 134.

The decision of the Court of Appeals in the instant case does not disapprove of either *West Africa* or its progeny, but, rather, seeks to distinguish this case on the ground that here a claim for actual damages already suffered has been made. (Opinion, page 36, Footnote 3.)

In asserting this distinction as a reason for its conclusion the Court of Appeals failed to properly and correctly apply the indemnity concept of *Ryan*—indemnity against "liability"—and has instead applied a concept of indemnity against "loss or damage".

Nevertheless, by failing to disapprove of *West Africa* and by relying upon a factual distinction which is immaterial to the basic premise underlying that decision, the Court of Appeals has left on the books untouched, cases which are in direct conflict with its decision herein.

Having failed to premise its inquiry and determination upon the theory of indemnity against "liability" the Court of Appeals erred in its conclusion that the allegations of Appellant's libel were presently sufficient.

It may be admitted that the "alleged breach of the promise to render workmanlike service necessarily occurred no later than the time of Eckles injury". (Opinion, p. 35). But, such "breach" could have created only a single cause of action, i.e., that of the longshoreman against the shipowner. Any rights which the longshoreman had against his employer were governed solely by the Longshoremen's and Harbor Workers' Compensation Act, 33 U. S. C. § 901 et seq. *Crawford v. Pope & Talbot, Inc.*, 206 F. 2d 758 (3rd Cir. 1953); *Ryan Stevedoring Co. v. Pan Atlantic S. S. Corp.*, 350 U. S. 124, 76 S. Ct. 232, 100 L. ed. 133 (1956).

Moreover, any right which the shipowner had against the stevedore did not become choate until, under *Ryan*, the liability of the shipowner to the longshoreman was first determined.

Thus, although the Court of Appeals' premise is correct, its conclusion that "in relation to the alleged breach of duty this libel cannot have been premature" is incorrect. (Opinion, p. 35.)

The error of the Court of Appeals lies in equating *an allegation of the scope* of this petitioners' undertaking and the manner of its performance *with an adjudication of such scope and manner.* (Opinion, p. 35.)

Since this Petitioner's liability for indemnity can arise only upon an *adjudication* in the action between the injured longshoreman and the shipowner as to the scope and manner of performance of petitioner's undertaking, a libel cannot presently aver an "adequate allegation" for it is impossible to allege what such an *adjudication* will be.

Since shipowner cannot make such an allegation, it follows that its libel must be premature.

This conclusion is consistent with the most basic precepts applicable to the law of indemnity. If we assume, arguendo, that the jury in the action between the injured longshoreman and the shipowner herein should find the shipowner is liable for failing to discharge a duty which shonld have been discharged by this Petitioner, it is only at the moment of such finding that a cause of action for "indemnity" between Respondent and this Petitioner will arise. Neither party herein can anticipate the conclusion of that jury.

The rule relating to the *time* when the right of indemnity *arises* is stated in Restatement, Restitution § 77:

> "(1) A person who, in whole or in part, has discharged a duty owed by him but which, as between himself and another should have been discharged by that other, is *thereupon* entitled to indemnity *if the time of performance has arrived.*" Emphasis supplied.

Thus, the obligation of indemnity said to arise between the shipowner and stevedore can only arise *when, as and if the shipowner is found liable because of the failure of the stevedoring company to perform its duty* to render workmanlike service. This prerequisite to a cause of action in indemnity cannot be said to exist at any time prior to the time at which the findings of the jury are declared in the

action between the injured longshoreman and the shipowner.

The contract of indemnity which, under the *Ryan* doctrine, is implied in the instant case, does not become "operative" until such time as the existence of liability has been ascertained by a court of law. In the instant case, the shipowner has not yet become "obligated to pay" nor has legal liability attached in the absence of a judgment. See: *Ashley v. Lehigh & W-B Coal Co.*, 232 Pa. 425, 430 (1911).

*Guarracino v. Luckenbach S. S. Co.*, 333 F. 2d 646 (2d Cir. 1964); *Massa v. C. A. Venezuelan Navigacion*, 332 F. 2d 779 (2d Cir. 1964); *Strachan Shipping Co. v. Koninklyke Nederlandsche S. M., N. V.*, 324 F. 2d 746 (5th Cir. 1963), cert. denied 375 P. S. 834 (1964), are all cases in which attorney's fees and costs were allowed to a shipowner against a stevedore *only after a jury had found that the cause of the longshoreman's injury was not attributable to the shipowner but to the stevedore.*

The validity of this position is demonstrated by cases such as *Olah v. Scindia Steam Navigation Co. v. Moon Engineering Co.*, 230 F. Supp. 161 (E. D. Va. 1964) where a longshoreman's injury was found to be caused by *neither* the unseaworthy condition of the vessel *nor* the negligence of the stevedore and the court stated:

> "Manifestly this is not a case where the impleading petitioner (shipowner) is permitted to recover attorney's fees and expenses." 230 F. Supp. at 164. Cf., *Beans v. Kihlstrom*, 197 F. Supp. 339 (D. C. Va. 1961).

Since the shipowner may recover fees and expenses only after a determination by the jury as to liability, it is clear that no cause of action claiming for such items of damage exists prior to such determination, and the cases cited by the Court of Appeals (Opinion, p. 35) do not hold to the contrary. It is therefore submitted that the District Court was correct in its conclusion that the libel in the instant case is premature and should be dismissed.

**D. Respondent's Action Cannot Be Predicated on Any Duty Owed to the Longshoreman.**

As a legal proposition one thing is certain and that is that the work of stevedoring the vessel, no matter how negligently done, imposed no liability on the Petitioner to the longshoreman who was allegedly injured beyond the obligation to pay such longshoreman benefits in accordance with the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. Sections 901 to 950). This latter Act has been held to apply to provide compensation for all injuries sustained by employees on navigable waters. Moreover, compensation under this Act is the sole right to which the longshoreman is entitled as against his employer, the stevedoring company: *Crawford v. Pope & Talbot, Inc.*, 206 F. 2d 758; *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.* 350 U. S. 124, 129. Section 5 of the Act expressly states that the liability for compensation shall be the *exclusive* remedy "and in place of all other liability of such employer to the employee".

In the *Ryan* case, *supra*, the Court said (p. 129):

> "The obvious purpose of this provision is to make the statutory liability of an employer to contribute to its employee's compensation the exclusive liability of such employer to its employee, or to anyone claiming under or through such employee, on account of his injury or death arising out of his employment. In return, the employee, and those claiming under or through him, are given a substantial quid pro quo in the form of an assured compensation, regardless of fault, as a substitute for their excluded claims."

In view of this clear declaration of interpretation of the Act, the Libel cannot be sustained or supported by this Honorable Court, upon any obligation alleged to be due to the longshoreman from the stevedoring company.

**E. The Basis of a Claim for Indemnity in Admiralty Must Be Contractual.**

Under the Longshoreman's and Harbor Workers' Compensation Act (33 U. S. C. § 901 et seq.) compensation is payable by a longshoreman's employer, irrespective of fault, for the death or disability of a longshoreman occurring upon navigable waters of the United States, but the employer's liability under the statute is "exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, *and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death*" (33 U. S. C. Sec. 905). (Emphasis supplied.)

While recovery under the statute is a longshoreman's exclusive remedy against his employer, the statute does not preclude a longshoreman from recovering damages from third persons, and under proper circumstances a longshoreman may recover damages from a vessel, a shipowner, or a ship operator for unseaworthiness or for negligence, or both. If a longshoreman recovers damages from such third person or vessel, the third person or vessel cannot recover *contribution in admiralty* from the longshoreman's employer: See for example *Halcyon Lines v. Haenn Ship Ceiling & Refitting Corp.*, 342 U. S. 282, 96 L. Ed. 318, 72 S. Ct. 277 (1952); *Brown v. American Hawaiian S. S. Co.*, 211 F. 2d 15 (3rd Cir. 1954).

Consequently, third persons or vessels which have paid sums in satisfaction or settlement of claims for personal injuries to, or death of longshoremen, and which seek recovery over of such sums from the longshoremen's employers, have frequently asserted a right of recovery, over against the longshoremen's employers, on a theory of indemnity.

In maritime law, there are two types of indemnity: (1) noncontractual or tort indemnity, and (2) contractual in-

demnity: *Mickle v. The Henrietta Wilhelmine Schulte,* 188 F. Supp. 77 (1960 D. C. Cal.). It is now recognized that tort indemnity is merely an extreme form of contribution (see *Mickle, supra*) and tort indemnity, like contribution, is not recoverable from a stevedoring company by a vessel, a shipowner, or a ship operator which has paid sums in satisfaction or in settlement of a claim for the death or disability of a longshoreman: *Mickle, supra.* The *Halcyon* case, cited *supra,* is frequently cited by courts in this area of the law for the proposition that there is no right of contribution in admiralty in non-collision cases.

The Longshoremen's and Harbor Workers' Compensation Act the pertinent terms of which have been referred to above, does not bar a Shipowner's right of indemnity against a stevedoring company: *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.,* 350 U. S. 124, 100 L. Ed. 133, 76 S. Ct. 232 (1956). However, such claim must be predicated upon a contract express or implied. Such litigation has two major branches: (1) suits on the express indemnity provisions of stevedoring contracts and (2) suits for indemnity for a stevedoring company's breach of its implied warranty of workmanlike service. The outcome of suits on express indemnity provisions of stevedoring contracts depends primarily, of course, upon the terms of the indemnity provisions sued upon.

In the instant case, notwithstanding the allegations of the Libel, the written agreement exhibited in this case (1b to 11b Record, incl.) reveals that there was no specific or express agreement to indemnify for personal injury liability and no specific or express agreement to stevedore in a competent and workmanlike manner, the vessel of the libellant. The sole reference to the responsibility of the Petitioner herein for the work done by it is in Paragraph 10 (Record 8b) wherein the Petitioner agreed *only* to be liable for damage done to the ship, its equipment and to cargo or loss of cargo overside through its negligence and even for cargo or baggage its liability was limited to negli-

gence or fraud on the part of its employees. No other word, phrase or paragraph of the agreement refers to or seeks to establish liability for negligence as to its own employees or other persons. The answer to Petitioner's exceptive allegations concedes that Libellant's claim to indemnity is predicated upon an implied undertaking and an implied contract of indemnity (Record 9a) completely extrinsic to the written contract between the parties.

The *Ryan* case held that in the absence of specific contractual provision, a stevedoring company impliedly warrants that it will perform its stevedoring services in a safe and workmanlike manner. In that case it found a "consensual obligation". This warranty is not a quasi-contractual obligation implied in law, but is an implied-in-fact warranty comparable to a manufacturer's warranty of the soundness of its manufactured product. A stevedoring company's warranty of workmanlike performance can be found only when it is of the essence of the stevedoring contract and although the contractual obligation may be express or implied, *the warranty does not arise out of non-contractual relationships.*

**F. The Basis of the Claim for Indemnity Herein Was Not Contractual.**

In the presence of a writing defining the obligation of the parties, specific provisions setting forth the limits of the duties assumed are to be expected. There is no evidence that in the instant case the parties had not chosen the language of the contract with care and premeditation. When it was desired that the shipowner be indemnified as to loss of cargo or damage to the ship and its equipment the parties did not find it difficult to impose an obligation to reimburse and set forth the conditions under which the obligation so undertaken should be operative. We should expect no less as to the heavy burden of being responsible for injuries to longshoremen employed by the stevedoring company. Indeed, in view of the language of Section 5 of

the Longshoremen's Act (33 U. S. C. 905), a "consensual obligation" such as found in *Ryan* and other cases to save the shipowner harmless should not be negated by the very terms and conditions of the contract sued upon, as in the instant case. It is reasonable to require that such contracts be drawn so as to make clear those areas of responsibility which are assumed by the stevedoring company: See Weinstock, *The Employer's Duty to Indemnify Shipowners for Damages Recovered by Harbor Workers,* 103 U. of Pa. Law Review, 321, 326 (1954).

In the case of *Gianni v. Russell,* 281 Pa. 320, the leading case in Pennsylvania on this point, the court said:

> "Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement. . . .
>
> "The writing must be the entire contract between the parties if parol evidence is to be excluded and to determine whether it is or not the writing will be looked at and if it appears to be a contract complete within itself 'couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing': *Seitz v. Brewers' Refrigerating Machine Co.,* 141 U. S. 510, 517."

We respectfully submit that the obligation to indemnify for injury is not found in the contract here involved. On the contrary, in the instant case an express written provision of the contract specifically refers to those instances in which the Petitioner shall be required to indemnify. *Since the question of indemnification was specifically considered by the parties and the obligation to indemnify for*

*personal injuries was omitted, it must be concluded that it was not intended to be imposed.*

It is obvious that the alleged undertaking in this case is non-contractual and is not to be found anywhere in the writing itself. In *American Stevedores Inc. v. Porello*, 330 U. S. 446 and *Weyerhaeuser S. S. Co. v. Nacirema Operating Co.*, 355 U. S. 563, the court held that specific reference to the contract must be made to determine, as a matter of fact the scope of the stevedore's undertaking relating to indemnity. We respectfully submit that nothing said by the Supreme Court in any other case changes this requirement or compels the determination that the shipowner is entitled to indemnity from the stevedoring company merely because it has undertaken to do the job.

We urge the application of principles of interpretation to our contract which are applicable to indemnity agreements generally and suggest that such contracts must express a clear intention by unequivocal language to impose liability for the particular loss involved upon the indemnitor.

Where no such consensual obligation is expressly assumed by the contractual arrangement, or if a contract cannot be read to lay the groundwork for such a contractual assumption, there can be no action of indemnity: *Brown v. American Hawaiian S. S. Co.*, 211 F. 2d 16. The Court of Appeals for the Third Circuit there repeated what it thought it had made clear in the case of *Crawford v. Pope & Talbot, Inc.*, 206 F. 2d 758, where it said:

> "There can be no action of indemnity in these cases which is not based on the violation of some contractual duty."

It is respectfully submitted that the claim for indemnity made in the instant case has no contractual foundation.

**G. Even if There Is a Contractual Obligation to Indemnify, It Is Not a Maritime Contract Cognizable in Admiralty.**

While admiralty jurisdiction in matters of tort depends upon locality—whether the act was committed upon navigable waters or not—in matters of contract, it depends upon the subject matter—the nature and character of the contract: *Grant-Smith-Porter Ship Co. v. Rohde,* 257 U. S. 469, 476, 66 L. Ed. 321, 324; *North Pacific S. S. Co. v. Hall Bros. Marine S. S. Co.,* 249 U. S. 119, 63 L. Ed. 510, *Weinstein v. Eastern Airlines,* 316 F. 2d 758.

The nature of this contractual obligation is said to be a contract to indemnify *against liability* as opposed to a contract of indemnity against loss or damage. See *West Africa Navigation v. Nacicrema,* 191 F. Supp. 131. This fact establishes that the cause of action does not arise from any maritime contract.

Even if it be found that a contractual obligation to indemnify exists, such obligation would not be a maritime contract cognizable in admiralty.

While a contract to do work on a ship located on navigable waters is undoubtedly maritime: *Union Fish Co. v. Erickson,* 248 U. S. 308; *Kossick v. United Fruit Co.,* 365 U. S. 731, 6 L. Ed. 2d 56; an agreement to indemnify, even if contractual in nature, is separate and independent of the maritime obligations undertaken in the performance of the contract. Where the agreement to indemnify is based upon an implied obligation, such obligation is wholly unrelated to the maritime obligation actually assumed by agreement between the parties.

In the instant case responsibility for *damages* or loss are contractually assumed under the maritime portions of the contract only by Paragraph 10 (Record, 8b) of the contract as to the ship and its equipment and as to cargo or loss of cargo overside through negligence or fraud of employees of the Petitioner.

The authorities have consistently found that indemnity obligations not arising directly out of a maritime contract or out of the maritime portion of a mixed contract, are non-maritime and are not cognizable in admiralty, particularly where these two kinds of obligation are separable.

Thus, in *The Wonder,* 79 F. 2d 312 (2nd Cir. 1935), where a suit was brought in admiralty against the City for damages to a tug caused when her propeller picked up a submarine cable lying above instead of below the river bed, the cables were laid pursuant to a contract in which the contractor agreed to indemnify the City. The Court refused to permit the City to implead the prime contractor on the basis of the indemnity agreement, because it said, "The obligation was not maritime, and therefore did not come within the jurisdiction of admiralty."

In *Armstrong Cork Co. v. Farrell,* 81 F. Supp. 848 (E. D. Pa. 1948) a fire occurred in a warehouse on a pier while the goods were awaiting shipment. The libellant, suing for damage to the goods sought to invoke admiralty jurisdiction on the basis that the goods were received by the vessel under a dock receipt requiring the issuance of a bill of lading and were thus covered by a maritime contract. The Court dismissed the libel, stating (pp. 848, 849):

> ". . . It is equally obvious that the obligations arising before actual loading and while the goods were on the dock are separable from the strictly maritime obligations arising during the actual process of loading or after they had been received in the ship's hold. For that reason, I am constrained to hold the obligation sought to be enforced is separable from the maritime features of the contract and that the court is without jurisdiction to enforce them in admiralty."

In *Cory Bros. & Co. v. U. S.,* 51 F. 2d 1010 (2nd Cir. 1931), a libel was filed by a corporation to recover the amount of disbursements incurred by it in defending a suit

for cargo damage brought by a shipper against the ship. It argued that there was an implied obligation to reimburse because of the faulty performance. The court held that the action was not cognizable in admiralty in any event, and also that there was in fact no such implied obligation.

In *Aktieselkabet Falk v. Lloyd Brazilerrio,* 267 F. 733, 738, it was held that a claim for breach of warranty in furnishing coal, which, because of its heating quality was not fit for ballast for which it was obtained, was not maritime.

In *Goumas v. K. Karras & Son,* 51 F. Supp. 145, affirmed 140 F. 2d 157 (2nd Cir. 1944), it was held that there is no jurisdiction in admiralty except of a maritime contract or maritime tort and that a claim for damages by a broker who had undertaken to supply a crew on the ship master's warranty of seaworthiness where the warranty was breached and the crew refused to work on the ship because it was unseaworthy, was not based on a "maritime contract" nor a "maritime tort" within the jurisdiction of admiralty.

An agreement or obligation, securing or guaranteeing the performance of a maritime contract is not itself a maritime contract within the jurisdiction of admiralty and such contract or undertaking cannot be sued on in admiralty: *Pacific Surety Co. v. Leatham and Smith Towing Co.,* 151 F. 440; *Eadie v. North Pacific S. S. Co.,* 217 F. 662; *Black Sea State S. S. Line v. Association of Int. Tr. Dist.,* 95 F. Supp. 180.

An alleged promise or obligation made on land to pay money on land, if libellant should suffer damages on land by reason of a claim or lawsuit on land, is not maritime in nature: *Clinton v. International Organization of Masters,* 254 F. 2d 370; *Mulvaney v. Dalzell Towing Co.,* 90 F. Supp. 259; *New England Mutl. M. Ins. Co. v. Dunham,* 20 L. Ed. 90, and the cases heretofore cited in this subdivision of this brief.

The mere fact that the Respondent's alleged rights are said to arise out of the contract does not alone render the claim a maritime cause of action: *D. C. Andrews & Co. v. U. S.*, 124 F. Supp. 362; *The Crystal Stream*, 25 F. 575; *The Humboldt*, 86 F. 351.

Where the contract is of a mixed nature, it is not a sufficient foundation for admiralty jurisdiction, that there are involved some ingredients of a maritime nature. The substance of the whole contract must be maritime, including the claim asserted, otherwise, the whole contract would most appropriately belong to a court of law unless severable. If severable, non-maritime portions of otherwise maritime contracts may be severed and in fact must be severed, since an admiralty court will not take jurisdiction of causes of action arising out of them: *D. C. Andrews & Co. v. United States, supra,* and cases cited therein.

The Petitioner's alleged undertaking to indemnify is legally unrelated to the maritime obligations undertaken in the written contract. This suit is not and cannot be predicated upon the manner in which the ~~Respondent~~ Petitioner performed its work on board the ship. For this activity, if negligent, the Petitioner as to the injured longshoreman, has been fully released by the Longshoremen's Act. The basis of this action must be a consensual obligation to reimburse the shipowner (in the event of a judgment against it) an agreement to indemnify which is not to be performed on the high seas or navigable waters, and is in no wise connected with a "vessel" and has no intimate relationship with navigation or interstate or foreign commerce: See generally *McGuire v. City of New York,* 192 F. Supp. 866; *Woodcraft Works v. U. S.*, 152 F. Supp. 82; *The Ciano,* 63 F. Supp. 892; *Berwind-White Coal Mining Co. v. City of New York,* 135 F. 2d 443; *Black Sea State S. S. v. Assn. of Int. Tr. Dist,* 95 F. Supp. 180.

The District Court, it is respectfully submitted, lacked jurisdiction in admiralty over the subject matter of the action.

## CONCLUSION.

Certiorari should be granted to review this decision which permits a shipowner to prematurely sue to recover an indemnity obligation not yet established. Such an action is both excessive and premature, where there is a pending action in the civil side of the court in the same District, in which the petitioner could have been timely joined as a third-party defendant and the liability of the shipowner, and the stevedoring company's involvement in such liability, has not yet been determined in the pending civil action, by a jury therein demanded by plaintiff.

Such shipowners should not be permitted to deliberately avoid the submission of the question of liability to a jury, as a "tactical maneuver".

The holding of the Court of Appeals is upon an important question of maritime law which is prolific of litigation. This Honorable Court should fully consider the issues raised, in this action and by this Petition, since their resolution by the federal courts has been conflicting and in this case contradictory to the rules of law established by this Court in prior cases.

Admiralty is historically a limited jurisdiction. The dividing line between cases maritime and non-maritime is not always clearly marked.

Article 3 of the Constitution vested in the federal courts jurisdiction over admiralty and maritime cases, and since that time, the Congress has largely left to this Court the responsibility for fashioning the controlling rules of admiralty law. This Court has long recognized its power and responsibility in this area and has exercised that power where necessary to do so. Where, as here, a particular procedure is being attempted which will serve to complicate and enlarge the jurisdiction of the District Courts contrary to rules of law heretofore established, this Court

should not hesitate to take action to correct the situation: See *Fitzgerald v. U. S. Lines*, 374 U. S. 16, 83 S. Ct. 1646, 10 L. Ed. 2d 720 (1963).

Respectfully submitted,

FRANCIS E. MARSHALL,
226 South 16th Street,
Philadelphia, Pa. 19102,
*Attorney for Petitioner.*

SYDNEY C. ORLOFSKY,
*Of Counsel.*

# Appendix.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14830

ELLERMAN LINES, LTD.,
*Appellant*

*v.*

ATLANTIC & GULF STEVEDORES, INC.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued September 24, 1964

Before: HASTIE and FORMAN, *Circuit Judges;* and KIRKPATRICK, *District Judge.*

## OPINION OF THE COURT

(Filed December 11, 1964)

By HASTIE, *Circuit Judge.*

The district court dismissed as premature a libel by Ellerman Lines, a shipowner, against Atlantic & Gulf Stevedores claiming indemnity "for all sums which it has been compelled to pay and to incur and for such additional sums as it may be required to pay hereafter" in connection with a suit, then and now pending in that court, by

Nathan Eckles, a longshoreman employed by Atlantic & Gulf, against Ellerman for personal injury suffered during the stevedoring of Ellerman's ship.

The libel alleged that, pursuant to a contract between the parties, Atlantic & Gulf had undertaken to stevedore Ellerman's vessel in a competent and workmanlike manner, but had failed to do so, and thereby had caused the injuries for which Eckles had sued Ellerman. The libellant also asserted that it "has been compelled to expend money in the nature of investigation expenses and has incurred additional expenses in the nature of counsel fees", will have to incur further expenses and may have to pay a judgment in favor of Eckles. Ellerman supported its libel with an affidavit showing that it had spent $283.29 for costs and other legal expenses. The court below reasoned that such a suit as this cannot be instituted and maintained until the injured longshoreman shall recover against the shipowner in circumstances which provide a legal basis for recovery over against the stevedoring company.

We observe at the outset that Ellerman, by instituting this separate proceeding in admiralty, has deliberately avoided the familiar procedure of impleading the stevedoring company as a third-party defendant in a longshoreman's civil action against the shipowner.[1] In the course of argument, libellant's proctor, with commendable candor, asserted that this was done because of apprehension, based upon experience, that a jury in the civil case would make a less competent and adequate determination of fair counsel fees as an item of indemnification than would a judge considering the same claim in admiralty. We must decide whether this tactical maneuver was lawful and timely.

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1. The usual procedure is exemplified by the leading case of *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.*, 1956, 350 U. S. 124. It is sanctioned by the provision of Rule 14(a), F. R. C. P. enabling a defendant to implead "a person not a party to the action who is or may be liable to him for all or part of the plaintiff's claim against him".

The libel alleges a promise, whether express or implied,[2] by the respondent to stevedore a vessel in a competent and workmanlike manner, a breach of that promise and consequent damage to the promisee. The alleged breach of the promise to render workmanlike service necessarily occurred no later than the time of Eckles' injury. Therefore, in relation to the alleged breach of duty this libel cannot have been premature. See *Unexcelled Chemical Corp. v. United States,* 1953, 345 U. S. 59, 65. True, the scope of the respondent's undertaking and the manner of its performance are essential elements of libellant's case and have not been adjudicated. But these are matters for subsequent proof under the adequate allegations of the libel.

The other essential element of the claim is damage caused by respondent's breach of warranty of workmanlike service. In the view of the court below, Ellerman might suffer such damage, including expenses of litigation, when Eckles should recover against it, *Brown v. San Alberto Cia Armadora, S. A.,* 3d Cir. 1962, 305 F. 2d 602, but not until then. We disagree. If conduct of Atlantic & Gulf in violation of its warranty to Ellerman was the sole responsible cause of Eckles' injury, as the libel alleges, the expense to which Ellerman is subjected in defending Eckles' suit against it to recover for that injury is an element of damage caused by the respondent's breach of warranty, even if Ellerman succeeds in defeating Eckles' claim. *Guarracino v. Luckenbach S. S. Co.,* 2d Cir. 1964, 333 F. 2d 646; *Massa v. C. A. Venezuelan Navigacion,* 2d Cir. 1964, 332 F. 2d 779; *Strachan Shipping Co. v. Koninklyke Nederlandsche S. M., N. V.,* 5th Cir. 1963, 324 F. 2d 746, *cert. denied* 376 U. S. 954. *Cf. Damanti v. A/S Inger,* 2d Cir. 1963, 314 F. 2d 395, *cert. denied* 375 U. S. 834. Since Ellerman insti-

2. The Supreme Court has described a stevedoring company's implied warranty of workmanlike service as "the essence of . . . [the] stevedoring contract . . . comparable to a manufacturer's warranty of the soundness of its manufactured product". *Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp.,* 350 U. S. at 133.

tuted this libel after it had made necessary out of pocket expenses and incurred obligations for legal services in defending Eckles' suit against it,[3] Ellerman is presently entitled to some recovery if it can prove the allegations of its libel.[4] Accordingly, we conclude that the district court was mistaken in ruling that this proceeding was premature.

An additional exceptive allegation by the respondent, that the claim for indemnity is not within admiralty jurisdiction, is without merit. Admiralty jurisdiction exists because this claim is founded upon a maritime contract, more particularly, a contract to be performed and allegedly breached in the rendering of stevedoring services to a ship in navigation. *American Stevedores, Inc. v. Porello*, 1947, 330 U. S. 446.

One other matter is of consequence. It would be duplicitous, unnecessarily time consuming, and possibly an invitation to controversy in one proceeding as to what had been decided in another, if Eckles' civil action and this admiralty suit should be tried on separate occasions. The consolidation of a civil action and an admiralty proceeding arising out of the same occurrence is approved practice in this circuit. *Jordine v. Walling*, 3d Cir. 1950, 185 F. 2d 662. *Accord, Jesonis v. Oliver J. Olson & Co.*, 9th Cir. 1956, 238 F. 2d 307. Rule 42(a), Federal Rules of Civil Procedure, confers upon a district court broad power, whether at the request of a party or upon its own initiative, to consolidate causes for trial as may facilitate the administration of justice.

Eckles, the plaintiff in the civil action, is not before us. Conceivably, consolidation may be objectionable in

3. In contrast, no claim was made for damages already suffered in an otherwise similar libel which the district court dismissed in *West Africa Navigation, Ltd. v. Nacirema Operating Co.*, E. D. Pa. 1961, 191 F. Supp. 131.

4. Whether in these circumstances and in the light of the flexibility of admiralty practice any formal amendment of the libel under Admiralty Rule 23 might become necessary or desirable with reference to additional damages incurred between the original filing and an ultimate decree, we need not and do not now decide.

some respect not now apparent to us. However, upon the remand of this proceeding, the district court on its own motion should consider the question of consolidation. And if it finds no disadvantages outweighing the obvious advantages of consolidation mentioned above, the court should cause this proceeding to be consolidated with the Eckles action for trial.

We are not unmindful that in *Fitzgerald v. United States Lines*, 1963, 374 U. S. 16, 21 the Supreme Court has ruled that "a maintenance and cure claim, joined with a Jones Act claim must be submitted to the jury when both arise out of one set of facts". The Court reasoned that such litigation "is essentially one lawsuit to settle one claim split conceptually into separate parts because of historical developments". *Id.* Obviously, the civil and admiralty claims here are asserted by different plaintiffs and are not related to each other in the same way as are a seaman's civil claim under the Jones Act and his admiralty claim for maintenance and cure. While it is arguable that the policy of the *Fitzgerald* case should be extended to the present situation, that is an unsettled question which has not been briefed or argued and technically is not before us. Therefore, we observe merely that the libellant, having won this battle, may find that it has not yet won the war to avoid the submission of its indemnity claim to a jury.

The judgment will be reversed and the cause remanded for further proceedings consistent with and indicated by this opinion.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 14,830.

ELLERMAN LINES, LTD.,
*Appellant,*

*v.*

ATLANTIC & GULF STEVEDORES, INC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

Present: HASTIE and FORMAN, *Circuit Judges,* and KIRKPATRICK, *District Judge.*

JUDGMENT.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and and adjudged by this Court that the order of the said District Court, filed November 21, 1963, be, and the same is hereby reversed, with costs, and the cause remanded for further proceedings consistent with and indicated by the opinion of this Court.

ATTEST:

IDA O. CRESKOFF,
*Clerk.*

December 11, 1964.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

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No. 14,830.

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ELLERMAN LINES, LTD.,
*Appellant,*

*v.*

ATLANTIC & GULF STEVEDORES, INC.

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Present: BIGGS, *Chief Judge;* and MCLAUGHLIN, KALODNER, STALEY, HASTIE, FORMAN, GANEY, SMITH and FREEDMAN, *Circuit Judges;* and KIRKPATRICK, *District Judge.*

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SUR PETITION FOR REHEARING.

The petition for rehearing filed by Atlantic & Gulf Stevedores, Inc., in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ WILLIAM H. HASTIE,
*Circuit Judge.*

Dated: January 22, 1965.